

No. 20-

IN THE
Supreme Court of the United States

FAIZAL SABAR,

Petitioner,
v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the United States Court of Appeals for the Fifth Circuit (“Fifth Circuit”)—which affirmed the District Court’s denial of Mr. Faizal’s motion to withdraw his guilty plea without an evidentiary hearing—conflicts with the decisions of this Court on an important matter, and therefore the decision by the Fifth Circuit calls for an exercise of this Court’s supervisory powers such that a compelling reason is presented in support of discretionary review by this Honorable Court.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption:

Faizal Sabar:	Petitioner (Defendant-Appellant in the lower Courts)
United States of America:	Respondent (Plaintiff-Appellee in the lower Courts)

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PETITION FOR WRIT OF CERTIORARI

Petitioner, FAIZAL SABAR, requests that this Honorable Court grant this petition and issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit. Mr. Sabar respectfully submits the District Court committed reversible error by failing to hold a hearing on Mr. Sabar's motion to withdraw his guilty plea prior to denying the motion. The Fifth Circuit did not apply the correct standard of review as defined by this Court and reversibly erred by affirming the District Court's denial of the motion without an evidentiary hearing. Accordingly, the decision by the Fifth Circuit is in conflict with decisions of this Court and a compelling reason is presented in support of discretionary review.

CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

From the Federal Courts:

The Order of the United States Court of Appeals for the Fifth Circuit, *United States v. Faizal Sabar*, No. 19-11006 (5th Cir. Sept. 8, 2020), appears at Appendix A to this Petition and is unreported.

The Judgment in a Criminal Case of the United States District Court for the Northern District of Texas, Fort Worth Division, appears at Appendix B to this petition and is unreported.

From the State Courts:

None.

GROUND FOR JURISDICTION

This Petition arises from a direct appeal which granted final and full judgment against Mr. Sabar. This action is on a criminal prosecution initiated by the Government.

Mr. Sabar was charged with sex trafficking. He pleaded guilty, but then filed a pro se motion to withdraw his guilty plea. The District Court denied the motion without holding a separate evidentiary hearing. A copy of the judgment appears at Appendix B. On appeal, the Fifth Circuit affirmed. A copy of the appellate decision appears at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in this favor; and to have Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Overview

On May 13, 2019, Mr. Sabar pleaded guilty to the offense of conspiracy to commit sex trafficking. ROA.110-36. On August 7, 2019, Mr. Sabar filed a handwritten pro se motion to withdraw his guilty plea. ROA.67-92. In his motion, Mr. Sabar argued he was innocent, his

plea was involuntary, and that he wanted new counsel to assist him at trial. ROA.67-92. There was no evidentiary hearing on the pro se motion. Rather, the District Court heard arguments on the motion during the sentencing proceeding and denied the motion. ROA.139-45.

The Factual Resume

Prior to the plea, Mr. Sabar and his trial attorney signed a factual resume which included a stipulation of facts. ROA.57-59. It provided that Mr. Sabar and two co-defendants conspired to force the victim ("AV1") to engage in a commercial sex act. ROA.58. In 2016, Mr. Sabar "acted" as AV1's "pimp." ROA.59. The factual resume stated that Mr. Sabar forced AV1 into sex acts and he would keep the profits. ROA.59. In November and December of 2017, AV1 was advertised on the internet for commercial sex acts. ROA.59. The document concluded that, on December 15, 2017, Mr. Sabar rented two rooms at a hotel to facilitate the commercial sexual activity. ROA.59.

The Presentence Investigation Report

The Presentence Investigation Report ("PSR" or "the Report") provided AV1's recitation of how the sex trafficking conspiracy operated. ROA.164-65. These allegations included physical assaults on AV1 and forced use of drugs until she became addicted to heroin and cocaine. ROA.165. On November 23, 2017, the police were summoned to a hotel in Fort Worth, Texas. ROA.165. There, they found AV1 knocking on a hotel room door wearing lingerie. ROA.165. She had in her possession a .22 caliber firearm. ROA.165. AV1

stated that she was afraid of Mr. Sabar. ROA.165. Mr. Sabar was not arrested until February 8, 2018. ROA.166

After the initial PSR guidelines were determined, Mr. Sabar was denied acceptance of responsibility. ROA.167-71. Ultimately, his guidelines punishment range was set at 240 months in the custody of the BOP. ROA.179. This was because the plea agreement provided that Mr. Sabar's sentence would not exceed 240 months in prison. ROA.179.

Motion to Withdraw the Guilty Plea

On August 7, 2019, Mr. Sabar filed a handwritten, pro se untitled motion. ROA.67-92. Mr. Sabar attached to his motion numerous letters from family members which Mr. Sabar believed established he was actually innocent and that his plea was involuntary and thus he requested new counsel so he could review the case for a trial. ROA.67-92. He also provided the Court with a letter from his mother. *See* ROA.140. This document included the following allegations;

- * trial counsel had used force, fraud and coercion on Mr. Sabar in the plea process;
- * trial counsel had used anger and rage to threaten Mr. Sabar into submission;
- * trial counsel made negative remarks regarding Mr. Sabar's race and religion;
- * trial counsel refused to provide assistance so Mr. Sabar could prove his innocence;
- * Mr. Sabar informed trial counsel that the factual resume which formed the basis for the plea agreement was "completely false" and that his trial counsel "ignored" his requests; and
- * the situation between trial counsel and Mr. Sabar deteriorated to the point where Mr. Sabar enlisted his family to help him with trial counsel.

ROA.67-70. Mr. Sabar also attached communications with counsel to his motion. ROA.72-92.

As discussed below, the District Court did not hold a separate hearing on the motion.

Instead, the Court discussed this filing at the beginning of Mr. Sabar's sentencing proceeding without holding an evidentiary hearing.

Additional Matters

The Government filed a notice that Mr. Sabar should receive a 3-level reduction for acceptance of responsibility. ROA.65. However, the Government withdrew the request at the sentencing hearing. ROA.145.

The Sentencing Hearing

Mr. Sabar was sentenced on August 29, 2019. ROA.137. The Court first addressed the pro se motion filed by Mr. Sabar. ROA.138. The Court began by questioning trial counsel for Mr. Sabar. ROA.138. The attorney responded:

- * he had obtained and reviewed discovery material from the Government;
- * he and his investigator had conducted an investigatory review of the case; and
- * he had shared the discovery and the results of his investigation with Mr. Sabar.

ROA.138-39.

The Court then turned its attention to Mr. Sabar and directly provided to Mr. Sabar the following instructions:

THE COURT: All right. Now, Mr. Sabar, do you want to discuss why you would like to remove your counsel? Don't–Don't answer me yet. Before you answer, I want to tell you that I have, of course, read the pleading you have filed and then you also provided to me or someone provided to me a lengthy letter, basically, from your mother about your case and it sounds as if from my review of the materials you presented that she also communicated directly

with Mr. Lehmann's boss or supervisor in this case. So I've read that information and so I think I understand the basis for your request, the pleading that you filed.

And so do you have anything else you want to add to that or do you want to talk about it more generally? And the reason I phrase all of this in this fashion is that I want you to be careful that you don't say something that could have negative consequences going forward. And I would like to give you whatever time you would like before you speak, if you would like, to talk to Mr. Lehmann about what you might say so that you can at least receive his counsel before you do it. But the floor is yours on how you would like to proceed unless, Mr. Lehmann, you have any objection to going—to going forward in that fashion. Why don't you go ahead and talk to your client.

(Off-the-record discussion with Defense Counsel Lehmann and the Defendant).

ROA.139-40 (emphasis in original).

At this point, counsel for Mr. Sabar stated: "Your Honor, Mr. Sabar has indicated that he has nothing that he wants to discuss with me and at this time I have no objections." ROA.140. This prompted the following exchange between the Court and Mr. Sabar:

THE DEFENDANT: May I read the letter that I've submitted to the Court?

THE COURT: Well, I've already read it.

THE DEFENDANT: Okay, So it will be part of my record?

THE COURT: It is in the pleading on the docket of this case, yes. And I have taken notice of it and—

THE DEFENDANT: Okay.

THE COURT: –that is what has prompted me to quiz or interrogate Mr. Lehmann before we get started, because it seems to me, before we can go any further, I needed that information from your counsel.

THE DEFENDANT: Okay. That's pretty much it. I—

THE COURT: Okay.

THE DEFENDANT: I believe I wrote everything down.

THE COURT: And I assure you, I've read it all.

THE DEFENDANT: Okay.

ROA.140-41 (emphasis in original).

The District Court then provided his ruling and the basis for the decision. The District Court applied the factors announced in *United States v. Carr*, 740 F.2d 339, 343 (5th Cir. 1983), which are used in the Fifth Circuit to determine if a motion to withdraw a guilty plea should be granted or denied. ROA.141-45. On the first factor, as to whether the individual asserted actual innocence, the Court concluded that this factor was neutral. ROA.142. With respect to whether a withdrawal would prejudice the Government, the Court determined that this factor weighed in favor of withdrawal of Mr. Sabar's guilty plea. ROA.142. The third factor, which is a consideration of how promptly the motion was filed, the Court concluded that this factor weighed against granting the motion. ROA.143. With regard to the factor which focuses on the burden on the Court as a result of granting the motion, the Court found its caseload was "reduced" and thus this factor was neutral. ROA.143. However, the Court also found it "would be a waste of judicial resources" to grant the motion and therefore the waste of judicial resources factor weighed against granting the motion. ROA.144. The Court additionally found that the factor which focuses on whether there was close assistance of counsel weighed against granting the motion. ROA.144. Specifically, the Court determined that Mr. Sabar had the assistance of counsel at the plea

hearing and at the plea hearing he said he had the time to discuss the case with his lawyer. ROA.144. Finally, on the final factor, as to whether the plea was freely and voluntarily made, the Court weighed this factor against granting the motion in light of Mr. Sabar's statements at the plea hearing. ROA.145. This led the Court to deny the motion to withdraw. ROA.146.

With regard to sentencing, Mr. Sabar was sentenced in accordance with the PSR and the plea bargain agreement. ROA.146-47. He was sentenced to serve 240 months in the custody of the Bureau of Prisons. ROA.146-47.

Notice of Appeal

Mr. Sabar timely filed a notice of appeal. ROA.100. The appeal to the Fifth Circuit followed. (Appendix A).

The Opinion of the Fifth Circuit

Mr. Sabar argued to the Fifth Circuit that it was reversible error to deny his motion to withdraw the plea and to proceed to ruling on the motion without an evidentiary hearing. (Appendix A). The Fifth Circuit disagreed and affirmed the ruling of the District Court. (Appendix A). Mr. Sabar now respectfully files this Petition for Writ of Certiorari.

**ARGUMENT AMPLIFYING REASONS RELIED
ON FOR ALLOWANCE OF THE WRIT**

I.

A Hearing Was Required

A. Standard of Review

The Circuit Courts have made it clear that if the defendant sets forth in a motion to withdraw a guilty plea facts which, if proven, justify relief, then an evidentiary hearing is required. *United States v. Mergist*, 738 F.2d 645, 648 (5th Cir. 1984); *see also United States v. Dunfee*, 821 F.3d 120 (1st Cir. 2016); *Zaffarano v. United States*, 306 F.2d 707 (9th Cir. 1962). The District Court's denial of a hearing on a motion to withdraw is reviewed for abuse of discretion. *United States v. Powell*, 354 F.3d 363, 371 (5th Cir. 2003). Indeed, the Fifth Circuit remanded a case involving the denial of a hearing on such a motion for "fuller determination of the reasons supporting" the granting or denying of withdrawal. *United States v. Pressley*, 602 F.2d 709, 712 (5th Cir. 1979).

The need for a hearing in this case is further supported by the Appellate Court's instructions as to how pro se motions should be reviewed. Pro se pleadings are to be liberally construed to determine the issues and facts which are being asserted. *United States v. Davis*, 629 F. App'x 613, 618 (5th Cir. 2005) (quoting *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam)); *see also Erickson v. Pardus*, 551 U.S. 89, 94 (2007). This is important in this case because the motion to withdraw the guilty plea was prepared by Mr. Sabar, who is not a lawyer, while he was in jail. He simply was attempting to justify his reasons for filing his motion and was not required to have any legal skills.

B. Application

The facts in this case were sufficiently alleged by Mr. Sabar such that the District Court should have granted an evidentiary hearing on his motion to withdraw his guilty plea. ROA.67-92. Mr. Sabar believed he was innocent without any reservation. ROA.67. He stated in his motion that he had always maintained his innocence. ROA.68. Mr. Sabar was unequivocal that his attorney would not advocate for his innocence because the lawyer unduly pressured him to plead guilty by “force, fraud and coercion.” ROA.68. Mr. Sabar further stated that the attorney had told him “to lie to the Court and the probation officer” and had “used anger and rage to threaten [him] into submission.” ROA.68. Mr. Sabar clearly asserted that he was actually innocent. ROA.68. Thus, any delay in moving to withdraw his plea was justified because Mr. Sabar had to bypass his attorney and go to the Court directly to assert his innocence via a motion to withdraw.

Accordingly, Mr. Sabar contends an evidentiary hearing on the motion should have been held before the District Court. Federal Rule of Criminal Procedure 11(d)(2)(B) is clear that if “the defendant can show a fair and just reason for requesting the withdrawal,” the plea should be withdrawn at the defendant’s request. It is beyond dispute that a guilty plea which was taken as a result of threats and coercion, and was involuntary, should be withdrawn. FED. R. CRIM. P. 11(b)(2). Respectfully, an evidentiary hearing was necessary in this case to properly determine whether the guilty plea was involuntary as a result of threats and coercion. Stated another way, the only way the Court could truly determine whether there were such threats was to hear from Mr. Sabar and his attorney.

II.
The Guilty Plea Should Have Been Withdrawn

A. Standard of Review

The denial of a motion to withdraw a guilty plea is generally reviewed for abuse of discretion. *United States v. Lord*, 915 F.3d 1009, 1013 (5th Cir. 2019) (citing *Powell*, 354 F.3d at 370). “A district court abuses its discretion if it bases its decision on an error of law or a clearly erroneous assessment of the evidence.” *Powell*, 354 F.3d at 370.

“A defendant does not have an absolute right to withdraw his guilty plea. *Lord*, 915 F.3d at 1014. However, the District Court has the discretion to “permit withdrawal before sentencing if the defendant can show a ‘fair and just reason.’” *Id.* (citing *Powell*, 354 F.3d at 370). The defendant bears the burden of establishing a fair and just reason for withdrawing a guilty plea. *Id.* (citing *United States v. Still*, 102 F.3d 118, 124 (5th Cir. 1996)).

The Fifth Circuit has historically relied on *United States v. Carr*, 740 F.2d 339 (5th Cir. 1984), to review arguments that a guilty plea should have been withdrawn. In *Carr*, the Fifth Circuit established seven factors which the District Court should address when considering whether a defendant should be permitted to withdraw a plea. *Id.* at 343-44. Specifically, the Fifth Circuit explained that these factors include: (1) whether the defendant asserted his actual innocence; (2) whether withdrawal would prejudice the Government; (3) the extent of the delay, if any, in filing the motion to withdraw; (4) whether withdrawal would substantially inconvenience the Court; (5) whether the defendant had the benefit of

closes assistance of counsel; (6) whether the guilty plea was knowing and voluntary; and (7) the extent to which withdrawal would waste judicial resources. *Id.*

In *United States v. Still*, 102 F.3d 118, 124 (5th Cir. 1996), the Fifth Circuit clarified that “[n]o single factor or combination of factors mandates a particular result.” Hence, as explained by the Fifth Circuit, “the district court should make its determination based on the totality of the circumstances.” *Id.*

B. Application

In the event this Court determines that no separate hearing was required, Mr. Sabar alternatively argues that Mr. Sabar’s pro se motion to withdraw his guilty plea should have been granted when the Court addressed the issue at sentencing. In making its ruling, the District Court applied the seven factors announced in *Carr* to evaluate whether to grant the motion. ROA.142. On the “actual innocence factor,” the Court initially found, Mr. Sabar’s unequivocal statement that he was actually innocent, that this factor was neutral because Mr. Sabar had pleaded guilty under oath. ROA.142, 145-46. The second factor, which focuses on whether the Government was prejudiced, weighed in Mr. Sabar’s favor. ROA.142. The Court weighed the factor of how promptly the motion was made against Mr. Sabar’s because of the approximately three-month delay in filing the motion to withdraw. ROA.142-43. The next factor, which examines the burden on the District Court as a result of a trial, was deemed neutral. ROA.143. The factor concerning whether it would be a waste of judicial resources for a trial was weighed against Mr. Sabar. ROA.143.

However, the factor on whether Mr. Sabar had the benefit of close assistance of counsel was weighed against Mr. Sabar. ROA.143-44. This was done despite the fact that the evidence at best showed that Mr. Sabar and his attorney were not working well together and at worst the evidence showed that the attorney had threatened, intimidated and coerced Mr. Sabar to plead guilty. ROA.68.

On the final factor, the Court found the Mr. Sabar's plea was knowing and voluntary because it was taken in accordance with Rule 11 of the Federal Rules of Criminal Procedure. ROA.144. The Court also found the plea was voluntary due to the "substantial benefit" Mr. Sabar received as a result of his plea agreement. ROA.144.

All of this led the District Court to deny the motion. ROA.144. The Fifth Circuit affirmed in light of: (1) the delay in filing the motion, (2) the fact that Mr. Sabar received close assistance of counsel, and (3) the fact that his plea was knowing and voluntary. (Appendix A, page 2).

Presuming arguendo such decisions can be made without an evidentiary hearing, the District Court's decision, and the Fifth Circuit's affirmance of that decision, were contrary to Federal Rule of Criminal Procedure and contrary to this Court's mandate that guilty pleas must be set aside for "fair and just reason[s]." *Lord*, 915 F.3d at 1014. While the District Court weighed some factors as neutral and in Mr. Sabar's favor, three of the significant factors weighed against Mr. Sabar's request. Respectfully, these three factors were adjudicated by failing to take into account that Mr. Sabar believed he had been coerced by his attorney to plead guilty. Indeed, that is important when considering why it took three

months for Mr. Sabar to file a pro se motion to withdraw and why he did not have the close assistance of counsel when he made his supposed voluntary plea. *See Still*, 102 F.3d at 124 (explaining that District Court must consider “the totality of the circumstances” when ruling on motion to withdraw guilty plea).

Finally, the fact that the District Court observed that the plea provided Mr. Sabar a “substantial benefit”—*i.e.*, a reduction to a sentence of 240 months—actually shows Mr. Sabar deeply believed in his own innocence. *See* ROA.144. Only an innocent man would want to withdraw a guilty plea which reduced a guidelines range, that was set at 292 months to 365 months, to exactly 240 months. This is another reason, perhaps the best, that the plea should have been withdrawn.

In *United States v. Hyde*, 520 U.S. 670, 677 (1997), this Court evaluated what was a “fair and just reason” for withdrawing a guilty plea. The Court observed that a guilty plea is not a trifling matter “but a grave and solemn act” which is “accepted only with care and discernment.” *Id.* (internal quotations omitted). Mr. Sabar respectfully submits that the denial of his motion to withdraw was reversible error because there were fair and just reasons to support a hearing on the motion and/or an order granting the motion, particularly in light of this Court observation that the entry of his guilty plea was such a grave and solemn act. Accordingly, this Petition should be granted.

CONCLUSION

Mr. Sabar respectfully submits that the decision of the United States Court of Appeals for the Fifth Circuit, which affirmed the decision of the District Court denying Mr. Sabar’s

motion to withdraw his guilty plea, conflicts with the decisions of this Court. Therefore the decision by the Fifth Circuit calls for an exercise of this Court's supervisory powers such that a compelling reason is presented in support of discretionary review by this Honorable Court.

WHEREFORE, PREMISES CONSIDERED, Petitioner, FAIZAL SABAR, respectfully requests that this Honorable Court grant this petition and issue a Writ of Certiorari.

Respectfully Submitted,

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